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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1017

ROBERT E. LUCAS, RALPH MIGNEREY
and R. W. JONES, SR.,
Petitioners,

versus

HENRY M. HOPE, JR., F. LAMAR FLEMING
and CHARLES T. WOLF,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
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ROBERT E. LUCAS, RALPH MIGNEREY
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully show in support of their Petition the following:

OPINIONS BELOW

The opinion of the District Court is not reported and is attached hereto as Appendix A.

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 515 F.2d 234 and is attached hereto as Appendix B.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on June 30, 1975. A timely petition for rehearing and suggestion for rehearing en banc was filed in said Court.

The order of the United States Court of Appeals for the Fifth Circuit denying the petition for rehearing and denying the petition for rehearing en banc was entered October 23, 1975, and is attached hereto as Appendix C. Judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 31, 1975, and is attached hereto as Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Does the United States District Court have jurisdiction pursuant to 28 U.S.C. 1331 of an action brought by members of the congregation of a local Presbyterian Church who remain loyal to The Presbyterian Church in the United States against those members of the congregation who withdrew from said denomination yet remain in possession of the church property where the complaint seeks a declaration that a statute of the State of Georgia affording color for the actions of the defendants violates the religion section of the First Amendment to the Constitution of the United States.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 U.S.C. 1331 is as follows:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

The applicable portion of the First Amendment to the Constitution of the United States is as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

The applicable portion of the Fourteenth Amendment to the Constitution of the United States is as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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The applicable Georgia statute is an Act of the General Assembly of Georgia, 1968 Session, pp. 565,822. The relevant portion is codified as Section 22-5504 in Chapter 22-55 "Churches, Religious and Fraternal Societies and Schools" in the Corporation Code of Georgia and reads as follows:

> "22-5504. The majority of those who adhere to its organization and doctrines represent the church. The withdrawal by one part of a congregation from the original body, or uniting with another church or denomination, is a relinquishment of all rights in the church abandoned."

STATEMENT OF THE CASE

Proceedings and Disposition in the Courts Below.

Plaintiffs as representatives of the class of the congregation of Vineville Presbyterian Church who remained loyal to The Presbyterian Church in the United States filed their complaint in the United States District Court for the Middle District of Georgia, Macon Division, on February 1, 1974. The defendants are representatives of the class of the congregation who formally withdrew from The Presbyterian Church in the United States but who continue to possess and exercise dominion over the Church Sanctuary and other Church property. The complaint sought a declaration that the Georgia Statute set forth above violated the religion section of the First Amendment and further sought an injunction against the

defendants' continued possession of and dominion over the Church Sanctuary and other Church property.

Defendants electing prior to answer to move under Rule 12 of the Federal Rules of Civil Procedure filed a motion to dismiss which included lack of Federal jurisdiction as one of its grounds.

Written briefs were submitted by the parties and the District Court entered an order on March 25, 1974, postponing a decision on the motions until the trial on the merits. The answer of defendants was filed on April 3, 1974.

After the answer was filed but without reception of additional briefs and without any hearing, either legal or evidentiary, the District Judge sua sponte entered an order on August 2, 1974, dismissing the complaint for want of Federal jurisdiction. Judgment was entered thereon and appeal to the United States Court of Appeals for the Fifth Circuit followed.

The case was argued orally and on June 30, 1975, the Circuit Court entered an opinion, authored by Associate Judge Skelton of the United States Court of Claims sitting by designation and joined by Circuit Judges Godbold and Gee, affirming the judgment of the District Court. A timely petition for rehearing and suggestion for en banc consideration was filed and was denied without opinion on October 23, 1975.

Statement of Facts.

The Presbyterian Church in the United States is a hierarchical Church with a connectional form of government. The local unit of the Church which is the congregation is governed by its Session, the Session is in turn governed by the Presbytery, the Presbytery governed by the Synod, and the Synod by the General Assembly which governs all subordinate Church units in the United States. Certain governmental units in this structure are specifically designated as Church Courts and any of the Church Courts are authorized to appoint a Commission to perform their functions.

There is a local unit of The Presbyterian Church in the United States known as Vineville Presbyterian Church located in Macon, Georgia. This church was established as a unit of The Presbyterian Church in the United States by action of the Presbytery of Macon on April 29, 1904.

On May 27, 1973, there was submitted to the congregation of the Vineville Presbyterian Church a resolution to withdraw the said church from The Presbyterian Church in the United States. At this meeting of the congregation, after a proposal for secret ballot was defeated, the congregation voted 165 for the resolution of withdrawal and 94 against the resolution. During the discussion at this meeting, a question was raised from the floor as to what percentage of a majority was required to pass the resolution; the moderator advised that a simple majority was sufficient.

After the passage of the resolution of withdrawal, the Presbytery of Macon-Augusta, the Church Court of The Presbyterian Church in the United States with immediate jurisdiction over the local Church unit, was notified by the secretary of the withdrawing group and the minister (the defendant Hope) of their withdrawal from the jurisdiction of The Presbyterian Church in the United States.

On June 26, 1973, a duly authorized Commission of The Presbyterian Church in the United States issued its ruling and judgment on the actions of the defendants and the class they represent; this ruling and judgment decreed that defendants and the class they represent were no longer officers or members of The Presbyterian Church in the United States and that plaintiffs and the class that they represent were the true congregation of the Vineville Presbyterian Church. No appeal was taken by defendants or any member of their class to any higher Church Court in The Presbyterian Church in the United States.

Defendants and the class that they represent have since that time continued to maintain possession and control of the Church Sanctuary and the other Church property.

Plaintiffs contend that the Georgia statute, Code Section 22-5504, is violative of the religion section of the First Amendment to the Constitution of the United States.

In their answer to the complaint, defendants say the following:

> "Paragraph 16 . . . defendants say that the majority of the congregation of the Vineville Presbyterian Church has continued in possession of the Church edifice at 2193 Vineville Avenue, and does so rightfully. In this connection, these defendants allege that the control of the property in question is vested in the majority of the congregation and that they are entitled to continue to possess it and exercise dominion over it."

Despite this explicit language, defendants have steadfastly maintained in briefs and oral argument in the Circuit Court that they do not rely on the offending statute. They have yet, however, to advance any basis for their assertion that control of the Church property is legally vested in the majority of the congregation.

The District Court, impressed that plaintiffs had not prior to filing this action sought to evict the defendants from the Church property in the Courts of Georgia found no actual case or controversy. The opinion of the Circuit Court agreed that there is no actual case or controversy as to the Georgia statute saying at page 236 of its opinion: "This is especially true in view of the fact that defendants say they are not relying on the statute." The Circuit Court also felt (page 236) that the action was essentially a suit for title and possession of real estate and that the attack on the Georgia statute was in anticipation or avoidance of a defense and hence did not suffice to establish Federal question jurisdiction.

Basis for Federal Jurisdiction in the Trial Court.

The complaint sets forth a well pleaded Federal question pursuant to 28 U.S.C. 1331 in that it seeks a declaration that a statute of the State of Georgia which affords color to the actions of defendants violates the religion section of the First Amendment to the Constitution of the United States.

REASONS FOR ALLOWANCE OF THE WRIT

The Court of Appeals has rendered an opinion involving an important branch of Federal jurisdiction which is in conflict with applicable decisions of this Court.

Argument

The First Amendment is made applicable to State action by the Fourteenth Amendment. *Everson* v. *Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

In the troublesome area of contests concerning church property, there are several allowable approaches which are consistent with First Amendment rights and prohibitions. See concurring opinion in *Maryland and Virginia Eldership of the Churches of God, et al.* v. *Church of God at Sharpsburg, Inc., et al.*, 396 U.S. 367, 90 S.Ct. 499, 24 L.Ed.2d 582 (1970).

One is that the States may follow *Watson* v. *Jones*, 13 Wall 679, 20 L.Ed. 666 (1872) and enforce the property

decisions made within a church of hierarchical polity by duly constituted church authority provided that such determination can be made without the resolution of doctrinal questions and without extensive inquiry into religious polity.

Georgia traditionally follows the *Watson* v. *Jones* approach. *Mack et al.* v. *Kime et al.*, 129 Ga. 1, 58 S.E. 184 (1907); *Sapp et al.* v. *Callaway et al.*, 210 Ga. 277, 79 S.E.2d 532 (1954).[1]

Another constitutionally permissible approach is the application of neutral principals of general property and corporation law. Such are not applicable in the instant litigation. The terms and conditions of the relevant deeds and conveyances affecting the subject property are not significant. Nor do the general provisions of the Georgia Non-Profit Corporation Code apply to this situation since the State as set forth above has legislated specifically in the Corporation Code as to Churches and Religious Societies.

Finally, the States may pass special statutes governing church property arrangements. This Georgia has done by enacting Section 22-5504 as set forth above.

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1 Defendants contend that the Supreme Court of Georgia in *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church, et al.*, 225 Ga. 259, 167 S.E.2d 658 (1969) discarded the *Watson* v. *Jones* approach. In this case which considered the Georgia litigation on remand from this Court after its decision in *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed. 658 (1969), the Supreme Court of Georgia dealt with the Georgia implied trust theory in the light of this Court's reversal. It did not, either directly or impliedly, discard the *Watson* v. *Jones* approach.

Such statutes must be carefully drawn to leave ecclesiastical polity as well as doctrine to church governing bodies.[2]

State statutes which interfere with ecclesiastical polity and doctrine offend the First Amendment and have been declared void. *Kedroff, et al.* v. *Saint Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120 (1952).

The Georgia statute clearly authorizes the majority of the congregation to control the church. It authorizes the congregation acting as a legislative body by majority vote to change established systems of church ownership without regard to church governing bodies and to the detriment of the minority and further to alter established doctrine without regard to church governing bodies. This violates the religion section of the First Amendment.

The Circuit Court did not, however, come to grips with this Constitutional issue. Rather it was impressed, as was the District Court, with the fact that neither the plaintiffs nor the parent church had made any efforts in the Georgia Courts to evict the defendants from the church property. This seems at total

2 In the concurring opinion in *Eldership* v. *Church of God at Sharpsburg*, supra, footnote 5 (p. 370) refers in this connection to *Goodson* v. *Northside Bible Church*, 261 F.Supp. 99, which was affirmed by the Fifth Circuit in 387 F.2d. 534 (1967). This case dealt with a First Amendment attack on an Alabama statute which allowed control to 65% of the congregation. Federal question jurisdiction was not questioned and the statute was declared in violation of the religion section of the First Amendment. This case was cited in the briefs of Petitioners and argued orally in the instant litigation. It was not, however, mentioned in the Court's opinion.

variance with the duality of our legal system for cases of this kind as enunciated by this Court in *Zwickler* v. *Koota*, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967).[3]

The Circuit Court seemed further impelled to its decision by the fact that the defendants contended both in brief and oral argument that they did not rely on the Georgia statute for their position. While it is clearly established that matters in anticipation or avoidance of possible defenses may not be relied on to establish Federal question jurisdiction, *Taylor* v. *Anderson*, 234 U.S. 74, 34 S.Ct. 724, 58 L.Ed. 1218 (1914), surely the converse must be true. A disclaimer by defendants of specific reliance on a constitutionally impermissible statute which is clearly relevant and material to the issues in the litigation should not defeat Federal question jurisdiction.

We think it patent were it not for this statute, which stands athwart the First Amendment rights of the plaintiffs, that under the record in this case *Watson* v. *Jones* would apply and the plaintiffs would already have long since been in possession of the Church Sanctuary and the other Church property. The disclaimer of the defendants cannot change the fact that the statute is on the books as a State sanctioned direction for the handling of church property disputes.[4]

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3 There is no suggestion in the opinion of the Circuit Court that the doctrine of abstention so as to allow a construction of the statute by the Georgia Courts should apply. Indeed the language of the statute is so clear that such would not seem to be a viable alternative.

4 Defendants have contended that the statute applies only to congregational churches. The language of the statute makes clear that such is not so; no Georgia case has so held. Indeed, the Supreme Court of Georgia in the first appearance of *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial*

Finally, the Circuit Court concluded that the plaintiffs' action is essentially a suit for title and possession of real estate and since they found no Federal question the issues must be decided under State law and in a State court. This holding is, we submit, in conflict with *The Oneida Nation of New York State, et al.* v. *The County of Oneida, New York*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974). This case involved the right of possession of certain lands which had formerly been part of the Oneida Indian Nation. This Court held that while the action was essentially a possessory action involving land, it presented a Federal question since Indian titles are matters of Federal law. The analogy to the instant case is clear. All of our citizens are entitled to practice their religion unhampered by State statutes which violate the religion section of the First Amendment. These are rights which arise under the Constitution of the United States and are guaranteed by it. The Federal question in the instant case is well pleaded and complies in every respect with applicable criteria for Federal question jurisdiction under the provisions of 28 U.S.C. 1331.

The fact that plaintiffs, in addition to the substantial Constitutional issue presented, seek an injunction to prevent defendants from further possessing or claiming title to the church property is no cause to

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Presbyterian Church, et al., 224 Ga. 61, 71, 159 S.E.2d 690 (1968) (subsequently reversed by this Court in *Presbyterian Church in the United States, et al.* v. *Mary Elizabeth Blue Hull Presbyterian Church, et al.*, supra) comments that the litigation there was between the local churches and the general church and not between two factions of the local church which latter type of litigation would be governed by Georgia Code Section 22-406, the identical predecessor of Georgia Code Section 22-5504.

deny Federal jurisdiction. *Hagans, et al.* v. *Lavine, et al.*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the opinion of the Circuit Court herein is in conflict with applicable decisions of this Court and that it justifies review by certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John B. Harris, Jr., one of counsel for the Petitioners, do certify that I have served the foregoing Petition for Certiorari upon the Respondents by depositing copies of the same in the United States mail, adequate postage prepaid, to their counsel of record as follows:

Edward S. Sell, Jr., Esq.
Georgia Power Building
Macon, Georgia 31201

Wallace Miller, Jr., Esq. and
W. Warren Plowden, Jr., Esq.
First National Bank Building
Macon, Georgia 31201

This ____ day of January, 1976.

_____

John B. Harris, Jr.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

ROBERT E. LUCAS, ET AL.,
Plaintiffs,

versus C.A. No. 74-20-MAC

HENRY M. HOPE, JR., ET AL.,
Defendants.

Filed: Aug. 2, 1974

OWENS, District Judge:

Robert E. Lucas, Ralph Mignerey and R. W. Jones, Sr., individually and in behalf of a class consisting of persons who are the true congregation of Vineville Presbyterian Church, filed their complaint alleging that they by virtue of a Georgia Law[1] which is repugnant to the Constitution of the United States, are being unlawfully deprived of possession of the church property located at 2193 Vineville Avenue, Macon, Bibb

1 1968 Ga. Laws 565, 822, informally codified as 1933 Georgia Code Annotated 22-5504 provides:

"Majority represent church. Withdrawal by part of congregation. — The majority of those who adhere to its organization and doctrines represent the church. The withdrawal by one part of a congregation from the original body, or uniting with another church or denomination, is a relinquishment of all rights in the church abandoned. (Acts 1968, pp. 565, 822)"

County, Georgia, known and identified as the Vineville Presbyterian Church. While plaintiffs claim deprivation of possession, they do not allege that they or the parent church have made any effort in the courts of the State of Georgia to evict the defendants from the said Vineville Presbyterian Church property. They do not say they have demanded possession and that defendants relying on the alleged unconstitutional law, refuse to surrender to them. Instead, they seem to say that they anticipate that if they seek to evict the defendants in the courts of the State of Georgia, the defendants will defend on the basis of the alleged unconstitutional law and the courts of the State of Georgia will refuse to evict the defendants on the basis thereof.

Under Article III of the Constitution of the United States the jurisdiction of United States District Courts is limited to actual cases or controversies. *O'Shea, Magistrate* v. *Littleton*, ___ U.S. ___, 38 L.Ed 2d 674, 94 S.Ct. ___ (January 15, 1974). Assuming the facts as stated by the plaintiffs to be true, their complaint does not show an actual case or controversy. It is merely anticipatory. This court does not therefore have jurisdiction of this complaint.

Even if the parties were attempting to proceed in the courts of the State of Georgia to resolve their differences and even if the courts of the State of Georgia were relying upon an alleged unconstitutional statute of this state to deny the plaintiffs possession of this church, the court still would not have jurisdiction. As the United States Court of Appeals for the Fifth Circuit recently stated in *Simpson* v. *Wells Lamont Corp., et*

al., ___ F.2d ___, (May 24, 1975), No. 73-1026, Slip Opinion p. 4085:

> "This case involves the fundamental question of who will preach from the pulpit of a church and will will occupy the church parsonage. The bare statement of the question should make obvious the lack of jurisdiction of a civil court. The answer to that question must come from the church. The District Court dismissed this civil rights suit brought by a pastor for damages for his ouster by church officials. As if the long history of separation of ecclesiastical courts and civil courts prior to and since the founding of this country were not sufficient to ground an affirmance, the first words of the Bill of Rights in the United States Constitution would clearly establish the unconstitutionality of any law asserted on behalf of the plaintiff: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' Certainly a congregation's determination as to who shall preach from the church pulpit is at the very heart of the free exercise of religion, which plaintiffs would corrode with an overlay of civil rights legislation and other parts of the Constitution. The people of the United States conveyed no power to Congress to vest its courts with jurisdiction to settle purely ecclesiastical disputes." *Id.* at 4088.

Because of the absence of jurisdiction in this court, defendants' motion to dismiss for lack of jurisdiction is hereby granted and said complaint is hereby dismissed.

SO ORDERED, this the 2nd day of August, 1974.

/s/ WILBUR D. OWENS, JR.
Wilbur D. Owens, Jr.
United States District
Judge

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APPENDIX B

Robert E. LUCAS, Ralph Mignerey and
R. W. Jones, Sr.,
Plaintiffs-Appellants,

versus

Henry M. HOPE, Jr., F. Lamar Fleming
and Charles T. Wolf,
Defendants-Appellees.

No. 74-3349.

United States Court of Appeals,
Fifth Circuit.

June 30, 1975

Rehearing and Rehearing En Banc
Denied Oct. 23, 1975

Appeal from the United States District Court for the Middle District of Georgia.

Before GODBOLD, Circuit Judge, SKELTON, Associate Judge,* and GEE, Circuit Judge.

SKELTON, Associate Judge:

This case involves a dispute as to the title and possession of church property. A controversy arose among the members of the congregation of the Vineville Presbyterian Church, located in Macon, Georgia, and on May 27, 1973, a resolution was adopted by

* Of the U.S. Court of Claims, sitting by designation.

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the congregation by a vote of 165 to 94 to withdraw from the Presbyterian Church in the United States, with which the Vineville Church had been affiliated since 1904. The minister, defendant Hope, was one of the withdrawing members. Those who voted against the resolution, including the plaintiffs Lucas, et al., remained in the church and now claim to be the true congregation of the Vineville Church.

The Presbyterian Church in the United States is a hierarchial church with a connectional form of government. The local church unit is governed by its Session, the Session by the Presbytery, the Presbytery by the Synod, and the Synod by the General Assembly which governs all local church units, Presbyteries and Synods in the United States. The Presbytery, Synod and General Assembly are specifically designated in the Book of Church Order as Church Courts.

The Presbytery of Augusta-Macon, the Church Court of the Presbyterian Church in the United States having immediate jurisdiction over the Vineville Church, was notified immediately after the passage of the resolution that defendant Hope and those associated with him had withdrawn from the Presbytery of Augusta-Macon and the Presbyterian Church in the United States. Thereafter, on or about June 26, 1973, the Augusta-Macon Presbytery, acting through its duly constituted Administrative Commission, issued a ruling to the effect that defendants and the class they represent are no longer officers or members of the Presbyterian Church in the United States and "have forfeited all ecclesiastical privileges of the PCUS and all rights to the property of the Congregation," and that the plaintiffs and the class they represent who re-

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mained loyal "are recognized and are hereby declared to be the true congregation of Vineville Presbyterian Church." No appeal was taken from this ruling by defendants or any member of the class they represent to any higher Church Court in the Presbyterian Church in the United States. Notwithstanding this ruling and decision, defendant Hope and the other withdrawing members aforesaid have remained in exclusive possession of the Vineville Church building, appurtenances and assets.

The plaintiffs, Robert E. Lucas, Ralph Mignerey, and R. W. Jones, Sr., individually and in behalf of a class consisting of persons who are the true congregation of the Vineville Presbyterian Church, as recognized and decreed by the Augusta-Macon Presbytery of the Church, filed their complaint in the United States District Court for the Middle District of Georgia against Henry M. Hope, Jr., F. Lamar Fleming, Charles T. Wolf, and the class they represent, all of whom withdrew from the Vineville Church as described above, claiming that by virtue of Section 22-5504 of the Georgia Code Annotated, which is said to be repugnant to the Constitution of the United States, the defendants are unlawfully depriving the plaintiffs of possession of the church property located at 2193 Vineville Avenue, Macon, Georgia, known as the Vineville Presbyterian Church. The statute complained of is as follows:

> The majority of those who adhere to its organization and doctrines represent the church. The withdrawal by one part of the congregation from the original body, or uniting

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> with another church or denomination, is a relinquishment of all rights in the church abandoned.

The plaintiffs allege that this statute violates the first amendment to the Constitution of the United States with respect to religion. The plaintiffs seek a declaratory judgment that the above statute, and especially the first sentence thereof, is null, void, and unconstitutional and that defendants and all members of their class be enjoined from possessing and exercising dominion over the Vineville Presbyterian Church building, appurtenances and other assets of the church.

Defendants filed a motion to dismiss plaintiffs' suit on the ground of lack of jurisdiction. They contend that they are not claiming under, nor relying on, Section 22-5504 of the Georgia Code for title and possession of the church property and that the statute is not involved in this controversy in any way. They contend further that the title and possession to this property must be decided according to the laws of the State of Georgia and that the proper forum for such litigation is a state court in that State; and that there is no Federal or constitutional question involved in the present suit.

The District Court granted defendants' motion to dismiss on the ground that it lacked jurisdiction over plaintiffs' suit, saying that neither the plaintiffs nor the parent church have made any effort in the courts of the State of Georgia to evict the defendants from the church property. Furthermore, the court said that plaintiffs' complaint does not show an actual case or

controversy as to the constitutionality of Section 22-5504 of the Georgia Code and that plaintiffs' allegations in that regard are merely anticipatory of a defense they think defendants will use if plaintiffs sue in a state court. The District Court correctly held that under Article III of the United States Constitution the jurisdiction of U.S. District Courts is limited to actual cases or controversies, citing O'Shea v. Littleton, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974), and that the court does not have jurisdiction of plaintiffs' complaint because it does not allege a case or controversy as to the Georgia statute. This is especially true in view of the fact that the defendants say they are not relying on the statute. Under these facts, there is no case or controversy involving the statute, and plaintiffs' allegations with reference thereto do not confer jurisdiction on the District Court to decide their complaint. Flast v. Cohen, 392 U.S. 83, 94, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). There is no other Federal question in the case. Under these circumstances, we are not required to decide whether the Georgia statute is constitutional and we do not do so.

It is well settled that matters in anticipation or avoidance of possible defenses cannot be relied on to establish Federal question jurisdiction. Taylor v. Anderson, 234 U.S. 74, 34 S.Ct. 724, 58 L.Ed. 1218 (1914); Huckins v. Duval County, 5 Cir. 1964, 286 F.2d 46; Shelby County v. Fairway Homes, Inc., 6 Cir. 1960, 285 F.2d 617; Burat v. Board of Levee Commissioners, etc., 5 Cir. 1974, 496 F.2d 1336, and 1 Moore Federal Practice, § 0.60 (8.-3).

Simply stated, plaintiffs' case is essentially a suit for the title and possession of real estate. This is an ac-

tion at law. White v. Sparkill Realty Corp., 280 U.S. 500, 50 S.Ct. 186, 74 L.Ed. 578 (1930). Questions involving the title and possession of real estate must be decided under state law and in a state court if no Federal or constitutional question is involved. White v. Sparkill Realty Corp., *supra;* Johnson v. Byrd, 5 Cir. 1965, 354 F.2d 982, and Burat v. Board of Levee Commissioners, etc., *supra*. For example, *see* Brown v. Clark, 102 Tex. 323, 116 S.W. 360 (1909) (Title to Presbyterian church property), and Browning v. Burton, 273 S.W.2d 131 (Tex.Civ.App.1954), rehearing denied, error refused, no reversible error) (Title to Methodist church property.) There is no Federal or constitutional question in this case. It follows that the plaintiffs have filed their suit in the wrong court.

We conclude that the District Court's judgment dismissing plaintiffs' suit for lack of jurisdiction was correct.

We do not reach the question as to who has the right to occupy the church property or to preach from its pulpit. This is an ecclesiastical matter over which Federal courts have no jurisdiction. *See* Simpson v. Wells Lamont Corp., 5 Cir. 1975, 494 F.2d 490 (1975.) Neither do we decide who has title and the right to possession of the church property, as we lack authority to do so in the present posture of this case. These matters are mentioned to aid the parties in case there is further litigation over this property in a state court.

The judgment of the District Court dismissing plaintiffs' complaint is affirmed without prejudice to an action at law by plaintiffs in a state court of competent jurisdiction should they elect to file such a suit.

Affirmed.

BLEED

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Office of the Clerk

October 23, 1975

TO ALL COUNSEL OF RECORD

No. 74-3349 - Robert E. Lucas, Ralph Mignerey & R. W. Jones, Sr. vs. Henry M. Hope, Jr., F. Lamar Fleming & Charles T. Wolf

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH
Clerk
/s/ CLARE F. SACHS
Deputy Clerk

cc: Mr. John B. Harris, Jr.
Mr. H T. O'Neal, Jr.
Mr. E. S. Sell, Jr.
Mr. W. Warren Plowden, Jr.

EED THROUGH

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-3349

D. C. Docket No. CA-74-20MAC

ROBERT E. LUCAS, RALPH MIGNEREY and
R. W. JONES, SR.,
Plaintiffs-Appellants,

versus

HENRY M. HOPE, JR., F. LAMAR FLEMING and
CHARLES T. WOLF,
Defendants-Appellees.

Appeal from the United States District Court for the
Middle District of Georgia

Before GODBOLD, Circuit Judge, SKELTON,
Associate Judge,* and GEE, Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the

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* Of the U. S. Court of Claims, sitting by designation.

Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Issued as Mandate: Oct. 30, 1975

This judgment, issued as mandate, is made the judgment and order of the District Court.

This the 3rd day of November, 1975.

/s/ WILBUR D. OWENS, JR.
Wilbur D. Owens, Jr.
U. S. District Judge